

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONRAD JERIMY HUNT,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 250369

Jackson Circuit Court

LC No. 03-001725-FH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of operating a motor vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1) and (8),¹ and driving while his license was suspended or revoked (DWLS), second offense, MCL 257.904(1) and (3)(b). He was sentenced as an habitual offender, third offense, MCL 769.11, to five years' probation for the OUIL conviction, with the first 240 days to be served in jail, and to ninety days in jail for the DWLS conviction. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his convictions must be vacated because the evidence failed to show that he was operating the motor vehicle in which he was seated when the police arrived. An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 514-515.

In *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), the Supreme Court defined the term "operating" for purposes of the OUIL statute as follows:

¹ MCL 257.625(8) has since been recodified as MCL 257.625(9).

Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.

In *Wood*, *supra* at 402, the defendant was found unconscious in a van at a McDonald's drive-through window, slumped forward with his head resting on the steering wheel. The vehicle was running and the car was in drive, while the defendant's foot rested on the brake. The defendant also had a \$20 bill in his hand and a can of beer between his legs. *Id.* The Court concluded that the evidence could support a finding that the defendant was operating the vehicle because it might have moved if he took his foot off the brake. *Id.* at 405.

Conversely, in *People v Burton*, 252 Mich App 130, 132, 143-147; 651 NW2d 143 (2002), this Court found that the evidence was insufficient to convict the defendant of OUIL where he was found sleeping in his parked truck with the engine running at a golf course, despite the defendant's admission that he drove the truck across the course's parking lot. In *Burton*, *supra* at 142-143, the evidence established that the truck's transmission was either in park or neutral, so the evidence did not show that the defendant intended to put it in motion.

More recently, this Court distinguished both *Wood* and *Burton* in *People v Solmonson*, 261 Mich App 657, 662; 683 NW2d 761 (2004):

Defendant relies on *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), and *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), to argue that he was not "operating" the parked car when the police found him unconscious in the driver's seat, and there was reasonable doubt that he drove to that location while intoxicated. Defendant's reliance on *Wood* and *Burton* is misplaced. In *Wood* our Supreme Court limited *People v Pomeroy (On Rehearing)*, 419 Mich 441, 444; 355 NW2d 98 (1984), which held, "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." In *Burton* the prosecutor charged that defendant was attempting to drive while intoxicated at the time the police found him unconscious in his lawfully parked vehicle with its engine running. This Court held that the prosecution failed to prove its theory that the unconscious defendant specifically intended to operate the vehicle while intoxicated at some point in the future but the police intervened before he could do so. *Burton*, *supra* at 143-144. But here, the prosecutor did not claim that the evidence established defendant was operating the vehicle at the point the police found him unconscious or that the police found defendant attempting to operate a vehicle while intoxicated. Here, the prosecutor argued that the evidence at trial presented a compelling circumstantial case that defendant had driven while intoxicated to the location where the police found him.

Here, viewed in a light most favorable to the prosecution, the evidence indicated that the van in which defendant was sitting at the time the police arrived was in a public street, away from the curb, and not legally parked, and the motor was running. As in *Solmonson*, there was sufficient circumstantial evidence to enable the jury to find that defendant had operated the van while intoxicated to the location in the street where the police found him. Thus, there was

sufficient evidence to prove beyond a reasonable doubt that defendant was operating the van while intoxicated, and without a driver's license.

Defendant additionally argues that the trial court committed instructional error because (1) it did not instruct the jury on the defense theory, and (2) it made additional comments during its instruction defining "operating" as an element of OUIL. Defendant informed the court at trial that he had no objections to the instructions given. An affirmative statement by counsel that there are no objections to the court's jury instructions constitutes express approval of the instructions and operates to waive any claim of error regarding the instructions. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Therefore, any issue regarding the trial court's jury instructions is waived. Even if the issue is reviewed as an unpreserved issue subject to forfeiture, appellate relief is not warranted because defendant has failed to show plain error. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello